STATE OF MICHIGAN

COURT OF APPEALS

FRED GRANATA,

Plaintiff-Appellant,

v

MELISA SAWICKI,

Defendant-Appellee.

UNPUBLISHED
February 19, 2002

No. 233712
Wayne Circuit Court
Family Division
LC No. 95-503100-DC

Before: Talbot, P.J., and Gage and Wilder, JJ.

PER CURIAM.

Plaintiff appeals as of right from an order awarding defendant primary physical custody of the parties' son. We affirm.

This extremely contentious and protracted custody case involves the parties' son, Lance, who was born May 18, 1994. The parties, although never married, were involved in a volatile, on-again off-again, four-year relationship, which was marked by abuse, harassment and instability. The record established that plaintiff, who was described as a "control freak," verbally and physically abused, harassed, and attempted to control defendant throughout their relationship, and that defendant had "dependency issues," and was impulsive, indecisive and immature. The parties' situation was complicated by a separate on-again off-again relationship between defendant and Timothy Richmond, which began in 1994.

In March 1995, plaintiff filed a petition requesting custody of the child. In a pattern that repeated itself several times throughout the six years this matter was pending, defendant reconciled with plaintiff after the petition for custody was filed and plaintiff dropped his request for custody. In 1997, defendant became engaged to Richmond. Shortly thereafter, plaintiff filed another request for change of custody, but this time defendant did not return to him. In early 1998, defendant discovered she was pregnant. In February 1998, defendant and Richmond were married and their child was born on October 4, 1998. According to evidence presented below, plaintiff was "enraged" over defendant's relationship with Richmond, and in an apparent attempt to derail the relationship, plaintiff sought to prevent Richmond from having any contact with Lance. Additionally, he continued to pursue his request for change of custody. Ultimately, plaintiff was unsuccessful; both the Friend of the Court referee and the trial judge determined that plaintiff's request for custody should be denied. Plaintiff now appeals that decision to this Court.

Relying on *Molloy v Molloy*, 247 Mich App 348; 637 NW2d 803 (2001), plaintiff first requests that this Court release to him the transcript of the *in camera* interview between the trial judge and his son. In *Molloy*, a special panel of this Court, acting pursuant to MCR 7.215(H), disagreed with this Court's prior decision in *Hilliard v Schmidt*, 231 Mich App 316; 586 NW2d 263 (1998), and held that a child's *in camera* interview during a custody proceeding must be limited to a reasonable inquiry into the child's parental preference, that all future *in camera* interviews with children in custody cases must be recorded and sealed for appellate review, and that a record of these interviews must be made available to the parties if the interview affects an additional child custody factor and the information makes a difference in the outcome of the case. The *Molloy* decision was released on September 4, 2001, approximately six months after the trial court awarded defendant physical and legal custody of her child. Thus, *Molloy* does not apply unless it is given retroactive effect. The general rule is that judicial decisions are given full retroactive effect. *People v Neal*, 459 Mich 72, 80; 586 NW2d 716 (1998). Prospective application is appropriate when the holding overrules settled precedent or decides an issue of first impression whose resolution was not clearly foreshadowed. *Lindsey v Harper Hosp*, 455 Mich 56, 68; 564 NW2d 861 (1997); *People v Doyle*, 451 Mich 93, 104; 545 NW2d 627 (1996).

Here, in support of his claim that *Molloy* should be given retroactive effect, plaintiff offers nothing more than the conclusory statement that "[t]here is simply no question as to the retroactivity of *Molloy*." A party may not merely announce a position and leave it to this Court to discover and rationalize the basis for the claim. *Goolsby v Detroit*, 419 Mich 651, 655 n 1; 358 NW2d 856 (1984). It is axiomatic that where a party fails to adequately brief the merits of an allegation of error, the issue may be deemed abandoned. See *Prince v MacDonald*, 237 Mich App 186, 197; 602 NW2d 834 (1999). Because plaintiff has failed to address the merits of his claim that *Molloy* should be given retroactive effect, we deem this issue abandoned on appeal. In any event, we are satisfied from our review of the record that even if *Molloy* were applied to this case, plaintiff would not be entitled to the relief he seeks. It is apparent that the information he alleges was obtained during the *in camera* interview would have been cumulative to the evidence presented at the custody hearing, and therefore would not have affected the outcome of the case.

Plaintiff next claims that the trial court erred in finding that no established custodial environment existed. We disagree. The trial court's finding that neither parent had an established custodial environment with the child is not against the great weight of the evidence. *Baker v Baker*, 411 Mich 567, 579-583; 309 NW2d 532 (1981); *Hayes v Hayes*, 209 Mich App 385, 387-388; 532 NW2d 190 (1995). The evidence showed that defendant had physical custody of Lance until he was four years old. In addition, the evidence showed that the physical custody arrangement between Lance's fourth birthday and the time of the de novo review hearing was marked by instability, frequent altercation, lack of permanence, and an ongoing, bitter dispute between the parties. Although plaintiff had custody of Lance for the twenty-eight months preceding the de novo review hearing, he was granted physical custody under an extended parenting time order, not by virtue of a permanent custody order, and Lance's custody was hotly contested the entire time he was in plaintiff's care. In light of the ongoing, bitter custody battle being waged by his parents, it cannot be said that there was a stable, settled atmosphere that would give rise to an established custodial environment with either parent. *Bowers v Bowers (After Remand)*, 198 Mich App 320, 326; 497 NW2d 602 (1993). Additionally, there was no expectation of permanence in the child's placement with plaintiff because of the upcoming custody trial. Repeated changes in physical custody and uncertainty created by an upcoming

trial can prevent the development of an established custodial environment. *Bowers, supra* at 326. Under these circumstances, the trial court's finding that neither party had an established custodial environment is not against the great weight of the evidence. *Fletcher v Fletcher,* 447 Mich 871, 879, 900; 526 NW2d 889 (1994).

Because the court found that no established custodial environment existed, it properly utilized the preponderance of the evidence standard in determining the child's best interests. *Hayes, supra* at 387. The trial court found that plaintiff failed to show by a preponderance of the evidence that a change of custody was in the child's best interests. Plaintiff challenges this determination, claiming that the trial court's findings on best interest factors (b), (c), (d), (f), (g), (h), (i), (j), (k) and (l) of MCL 722.23 were against the great weight of the evidence. We have considered plaintiff's claims with regard to the challenged factors, but conclude that none of the court's findings are against the great weight of the evidence. In none of the instances does the evidence clearly preponderate toward the opposite finding. *Fletcher, supra* at 876-879, 900. Additionally, we conclude that the trial court's decision to award primary physical and legal custody to defendant was not an abuse of discretion.

Lastly, in light of our disposition, we need not address plaintiff's claim that this matter should be remanded to a different judge for a new custody trial.

Affirmed.

/s/ Michael J. Talbot
/s/ Hilda R. Gage
/s/ Kurtis T. Wilder